In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 423

WILLIAM EZRIA POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on count 7 of an indictment which charged that on April 5, 1967, he sold thirty gallons of distilled spirits, the containers of which did not bear stamps evidencing payment of the required tax, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1). He was sentenced to two years' imprisonment to be followed by three years' probation. The court of appeals affirmed *per curiam* without oral argument.

The sole contention both below and in this Court rests on the assertion that there was fatal ambiguity in the verdict. In addition to the substantive offense

charged in count 7, petitioner was named as a member of the conspiracy charged in count 1. That count alleged five overt acts which were the acts charged as substantive offenses in other counts. Overt act #5 charged the identical conduct which was the subject of count 7. In his initial instructions, the trial judge charged that the defendants "could be found guilty, not only of the conspiracy, but also of the overt act counts because they are different counts" (R. 270). The jury returned with the verdict: "[N]ot guilty on the conspiracy. Guilty on overt acts 2–5. Not guilty on overt acts 1, 3 and 4" (R. 286). The trial judge told the jury that they could convict or acquit on the various counts of the indictment but not an overt act. He asked the foreman whether the jury had considered counts 6 and 7 and the foreman indicated that it had not (R. 286–287). The court then accepted the verdict of not guilty on the conspiracy count and sent the jury back for further deliberations after reinstructing them as to the difference between conspiracy and the violations alleged in the substantive counts. During its deliberations, the jury sent a note asking whether the counts could be "separated" (R. 290). The court in response gave the instruction set forth at Pet. 4–5 to the effect that the counts were all separate crimes and that the jury could "find some of [the defendants] or all of them guilty or not guilty on the overt acts, or substantive counts in the indictment, . . . either one or all of the substantive counts" (R. 290). The jury thereafter returned the verdict: "Guilty on acts 3, 4, 7. Not guilty 1, 2, 5, 6."

As the court of appeals observed (Pet. App. A, 9), there was no overt act numbered seven. It is clear, both from the prior context and the words used, that the jury's verdict, although rendered in terms of "acts," was a determination of guilt or innocence with respect to the seven counts contained in the indictment.[1]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1969.

[1] It is also clear from the initial defective verdict returned on the conspiracy count that the jury had initially concluded that petitioner did in fact commit the acts charged in count 7 which were alleged as overt act 5 in the conspiracy count.

U.S. GOVERNMENT PRINTING OFFICE: 1969